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# Supreme Court of the United States

**October Term, 1964**

No. 1042

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

*Petitioners,*

*against*

PAN AMERICAN WORLD AIRWAYS, INC.

*Respondent.*

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

*Petitioners,*

*against*

HONORABLE EDMUND L. PALMIERI, Judge of the United States District Court for the Southern District of New York,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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HONORABLE EDMUND L. PALMIERI, Judge of the United States District Court for the Southern District of New York,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Second Circuit dismissing the appeal from the District Court's stay order in the first above case and denying the original mandamus application in the second case.

## The Opinions Below

The United States District Court for the Southern District of New York, per Honorable Edmund L. Palmieri, District Judge, wrote three opinions dated respectively May 22, 1964 (R 108-120; RM 55, Exhibit D, pp. 1-13),[1] June 2, 1964 (R 127; RM 59), and July 15, 1964 (R 205-208; RM 64, Exhibit N, pp. 1-4), in the first of the above cases. The *per curiam* opinion of the Court of Appeals, applicable to both cases, is dated January 13, 1965 (RM 141-144; RA 11-14) and is reported at 340 F. 2d 160. None of the District Court opinions is as yet reported and copies of all of the opinions herein are appended hereto as Appendix A. Similarly appended is the judgment of the Court of Appeals of January 13, 1965 (RM 145; RA 15), dispositive of both cases, for which review by this Court's writ of certiorari is sought, and the order of the District Court of June 1, 1964 (R 125, 126) from which the appeal to the Court of Appeals was taken (R 128, 129).

## Statement of Grounds of Jurisdiction

The judgment of the Court of Appeals, dismissing the appeal in the first case and denying mandamus in the second case, was dated and entered January 13, 1965.

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[1] References are to pages of the records herein. In the first case, the appeal to the Court of Appeals, the record consists of two parts, separately certified and paginated, viz., the papers brought up from the District Court, and the record of proceedings in the Court of Appeals in that appeal. Since the latter consists only of the notices of motion in the appeal, the opinion of the Court of Appeals and its formal order, that portion of the record is designated herein as "RA", while the District Court record is designated as "R".

The record in the second case, an application for mandamus originating in the Court of Appeals, is designated as "RM".

No rehearing in the Court of Appeals nor any extension of time within which to petition for certiorari has been sought.

The jurisdiction of this Court to review the aforesaid judgment by writ of certiorari is conferred by 28 U. S. C. §1254(1).

## Questions Presented

1. As to the appeal to the Court of Appeals (first case):

Whether an interlocutory order, granted on a defendant's application based on asserted primary jurisdiction in an administrative agency, which stays all proceedings in a law type of action for damages until proceedings are initiated and concluded in an administrative agency having only equity type remedies, is an appealable stay of an action at law in favor of an equitable defense or counterclaim, as from an injunction under 28 U. S. C. §1292(a)(1), where the opinions of the Courts below concede the possibility of the administrative proceedings defeating the action.

2. As to the mandamus proceedings in the Court of Appeals (second case), assuming unappealability of the stay order:

a) Whether the Civil Aeronautics Board, powerless to give a money remedy, has primary jurisdiction of the matters alleged in an antitrust action seeking only treble damages, encompassing also a federal tort cause of action for single damages on the same facts, where plaintiff air freight forwarders charge defendant aircraft operator with past misconduct pursuant to defendant's wholly terminated agreement, coordination and conspiracy with another air

freight forwarder. The case does not involve rates or routing practices; all interested parties are air carriers within the meaning of the Federal Aviation Act of 1958; and no proceedings looking to immunization of the agreement and its implementation from antitrust under §§412 and 414 of the Act, nor the correction of unfair competitive practices under §411 of the Act, have ever been begun.

b) Whether a wrongful and erroneous cession of the primary and exclusive jurisdiction of the district court of a Clayton Act treble damage antitrust action does not require the issuance of mandamus by the court of appeals to protect the original and exclusive jurisdiction of the district court, the appellate jurisdiction of the court of appeals, and the right of petitioners, as plaintiffs, to trial of their whole case by court and jury.

## Statutes Involved

The statute bearing on appealability, the only issue involved in the first case is:

Judicial Code, 72 Stat. 1770; 28 U. S. C. §1292(a)(1).

With respect to the mandamus case, the following groupings of statutes are pertinent:

a) *The substance of the causes of action*

Sherman Act, §§1 and 2; 26 Stat. 209, as amended; 15 U. S. C. §§1 and 2;

Clayton Act, §4; 38 Stat. 731; 15 U. S. C. §15;

Federal Aviation Act of 1958, §404(b); 72 Stat. 760, Title IV, §404(b); 49 U. S. C. §1374(b).

b) *The issue of primary jurisdiction*

Federal Aviation Act of 1958;
72 Stat. 769, Title IV, §411; 49 U. S. C. §1381;
72 Stat. 770, Title IV, §412; 49 U. S. C. §1382;
72 Stat. 770, Title IV, §414; 49 U. S. C. §1384;
72 Stat. 798; Title XI, §1106; 49 U. S. C. §1506.

62 Stat. 931; 28 U. S. C. §1337.

c) *As to the availability of mandamus*

All Writs Act; 62 Stat. 944 as amended by 63 Stat. 102; 28 U. S. C. §1651;
Rule 81(b), Federal Rules of Civil Procedure.

The pertinent text of the foregoing statutes is set forth in Appendix B to this petition.

## Statement of the Case

The petition for mandamus (RM 3-13) fairly states both the substance of the complaint (R 1-10; RM 14-23) and the proceedings which brought both cases to the Court of Appeals.

The complaint, filed on January 8, 1964 in the United States District Court for the Southern District of New York (R B, 1), sets forth two causes of action on behalf of the plaintiffs Allied Air Freight, Inc. and Allied Air Freight International Corp. (collectively called Allied) against the defendant Pan American World Airways, Inc. (hereinafter called Pan American), viz., a) a Clayton Act action for treble damages for Pan American's violation of §§1 and 2 of the Sherman Act in agreement, combination

and conspiracy with one Add Airfreight Corp. (hereinafter called Add), an air freight forwarder in direct competition with Allied, and b) a federal tort action for single damages based on Pan American's unilateral violation of §404 of the Federal Aviation Act of 1958 (49 U. S. C. §1374) in discriminating, as an air carrier engaged in the actual operation of cargo carrying aircraft, against its would-be customer, Allied.[2]

In the beginning of 1962 Allied was, as it had been for many years prior thereto, the largest air freight forwarder and consolidator in the trade between New York and Puerto Rico while Add was a newcomer to that trade. Like all air freight forwarders, the essence of Allied's operation was its consolidation of goods of individual consignors for shipment by air, with breakout from consolidation at the end of the flight and local delivery to individual consignees; and the major source of its profits was the spread between the airline tariff rate applicable to the individual consignor's shipment, charged by Allied to the consignor, and the bulk rate charged to Allied by the airline performing the actual air transportation.

Pan American could and did, legitimately, compete with Allied in the direct solicitation and handling of the custom of originating consignors, but, while Allied, Add and Pan American were all, by the terms of the Civil Aviation Act of 1958, "air carriers", the important difference between Pan American and the others was that Pan American alone was an actual owner and operator of aircraft. As such,

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[2] The jurisdiction of the Court of Appeals to entertain the mandamus proceeding, the second case herein, is grounded on 28 U. S. C. §1651 (Appendix B, p. 6b).

analogous to the duties of a common carrier, Pan American was bound neither unduly to discriminate against any persons, including air freight forwarders and consolidators, tendering freight to it for actual air carriage, nor unduly to preference others (R 4; RM 5).

The gist of the complaint is that, in or shortly before August, 1962, Pan American agreed, combined and conspired with Add to damage and destroy the business of Allied so that Add could secure a monopoly of the air freight forwarding business in the New York-Puerto Rico trade, while Pan American would, through Add, obtain greater control and a monopoly of the actual air carriage in that trade and, by force of example, in other places (RM 22; R 6).

Implementation of the conspiracy was principally as follows:

a) Between August 10th and 29th, 1962, a time when Pan American was running the only regularly scheduled daily flight originating in San Juan capable of affording Puerto Rico consignors next day delivery in the New York metropolitan area, Pan American embargoed goods consolidated by Allied while filling each such flight with Add's consolidations. Simultaneously, Pan American and Add jointly solicited Allied's Puerto Rico customers urging them to switch their custom to Add on the assurance that Add had top priority with Pan American and that goods given to Add would move while goods continued to be given to Allied would stay behind. This outright embargo was ameliorated through the informal mediation of Civil Aeronautics Board personnel (R 6, 7; RM 18a, 19).

b) The embargo was followed by more selective and subtle modes of discrimination by Pan American such as intentional backlogging of Allied's shipments on one pretext or another (R7; RM 19).

c) Again, in pursuance of the conspiracy, Pan American, on November 26, 27 and 28, 1962, imposed still another embargo, this time in New York, on Allied's shipments to Puerto Rico, in favor of Add (R 8; RM 20).

Agreement, combination and conspiracy between Pan American and Add came to a definite end, as well as discrimination in actual air carriage, in the Spring of 1963 when Add fell out with Pan American and took its business to an airline in direct competition with Pan American (R 8; RM 20).

The complaint also alleged that, beginning on December 20, 1963 and continuing down to the commencement of suit (January 8, 1964) Pan American unilaterally attempted to destroy Allied by destroying its credit—threatening to and actually denying to Allied the use of Pan American's airway bills and cancelling Allied's agency and credit facilities with Pan American—all on the pretext of non-payment of Allied's short term obligations to Pan American (R 8, 9; RM 20, 21). In the course of reargument, Allied announced its unequivocal intention, as of right, to amend the complaint by deleting these destruction of credit allegations (R 169; RM 62, Exhibit I, p. 7), and the District Court accepted the amendment (Appendix A, p. 21a).

The complaint is therefore to be taken as pleading an action, for money damages only, for acts done pursuant to an agreement, combination and conspiracy begun in or

shortly before August, 1962, and terminated in the Spring of 1963.

By notice of motion dated March 10, 1964 (R 17; RM 20), Pan American moved the District Court for dismissal or stay of the action on the ground that the original primary jurisdiction of the cause was in the Civil Aeronautics Board rather than in the District Court, and, on May 22, 1964, that Court, per Palmieri, J., decided in a written opinion (Appendix A, pp. 7a-15a) that the "action should be stayed until the plaintiff [Allied] exhausts its available remedies before the CAB." (Appendix A, p. 15a). In the settlement of the Court's order of June 1, 1964 to that effect (R 125, 126; RM 57, 58), the District Court turned down Allied's application for a discretionary appeal certificate (R 178-181; RM 56, Exhibit E, pp. 1-4), and issued its memorandum of denial of June 2, 1964 (Appendix A, p. 18a).

Appeal was, on June 3, 1964, taken from the order of June 1, 1964 (R 128, 129). On the same day, the opinion in *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602 (2 Cir. 1964), *cert. dismissed* March 8, 1965, — U. S. —, was published, and Allied moved for reargument, on the basis of that opinion, praying *vacatur* of the stay, or, in the alternative, for the grant of a discretionary appeal certificate pursuant to 28 U. S. C. §1292(b) (R 132-133; RM 60-61). Judge Palmieri, to whom the motion was referred, while granting reargument, adhered to his original determination and, once again, turned down the application for a certificate (Appendix A, pp. 19a-22a).

In the Court of Appeals, Pan American moved for dismissal of the appeal on the ground that it had been taken from an unappealable interlocutory order (RA 1, 2), and

Allied countered with an original application for mandamus, conditioned on the dismissal of the appeal, directing the District Judge to vacate his stay order and to deny Pan American's original jurisdictional application (RM 1-13).

The verified mandamus petition alleged that no proceedings related to the underlying action or mandamus proceedings had ever been begun in the CAB (RM 12) and none were pending.

Meanwhile Allied Air Freight, Inc. which had gone into a Chapter XI Arrangement in the United States District Court for the District of New Jersey (R 174, 175), was, on July 6, 1964, adjudicated a bankrupt (RM 3), the Receiver in the Arrangement becoming the Trustee in the Bankruptcy (R 174-175; RM 12). Allied Air Freight International Corp., while not a party to any formal insolvency proceedings, simultaneously became non-operative (RA 7-8).

Dismissal and mandamus applications came on to be heard before Waterman, Moore and Kaufman, JJ., on December 7, 1964, and the Court, on January 13, 1965 issued its *per curiam* opinion (Appendix A, pp. 1a-4a; 340 F. 2d 160) dismissing the appeal and denying mandamus. It is for review of the judgment of that Court of January 13, 1965 (Appendix A, pp. 5a, 6a) that this petition for a writ of certiorari is made.

## Argument

### As to the Appealability of the District Court's Stay Order (First Case)

The question of appealability, in the appeal to the Court of Appeals from the District Court stay order was, of course, argued and determined without reference to the substantive merits of the determination appealed from.

In deciding that the interlocutory stay of the treble damage action was not the equivalent of an interlocutory injunction for 28 U. S. C. §1292(a)(1) appeal purposes, the Court of Appeals made a ruling, never before so unqualifiedly advanced, that administrative proceedings were not to be equated with historical equity actions (Appendix A, p. 3a). That ruling runs counter to both the rationale of *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449 (1935) and the policy intended by it.

Decided on the same day as *Shanferoke* was *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935), the leading case in establishing the criteria by which the grant or denial of the stay of an action will or will not be equated to an injunction for appeal purposes under present 28 U. S. C. §1292(a)(1). Better than a paraphrase of *Enelow*, which dealt with the appealability of a District Court order staying an action for the proceeds of a life insurance policy pending the prior trial of a counterclaim for cancellation of the policy for fraud, is the language of the Court itself, per Hughes, Ch. J., at pp. 381, 2:

> "The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within the

purview of §129 of the Judicial Code (28 U. S. C. 227) permitting appeal.

"This section contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of §129. And, in this aspect it makes no difference that the two cases, the suit in equity for an injunction and the action at law in which proceedings are stayed, are both pending in the same court * * *."

Thus did *Enelow* lay down the two basic criteria determining the appealability or non-appealability of stays, viz., 1) the appealable stay or refusal of stay must be an exercise of equitable power, and, 2) mere stays of proceedings, based on the inherent power of any court to control the progress of the cause before it, are not appealable regardless of the nature of the underlying actions or proceedings.

*Shanferoke*, 293 U. S. 449, 452, as a gloss on *Enelow*, was very suggestive of the possibilities of growth and expansion of the *Enelow* rule to cover analogous situations. Thus the grant or refusal of a stay favoring arbitration of the dispute was accorded appealability, Brandeis, J. saying:

> "For the reasons stated in Enelow v. New York Life Ins. Co., decided this day, *ante*, p. 379, an order granting or denying a stay based on an equitable defense or cross-bill, interposed in an action at law • • • is appealable under §129. We are of the opinion that the special defense setting up the arbitration agreement is an equitable defense or cross-bill • • •; and that the motion for a stay is an application for an interlocutory injunction based on the special defense."

*Schoenamsgruber* v. *Hamburg American Line*, 294 U. S. 454 (1935), decided a few weeks after *Enelow* and *Shanferoke*, by denying appealability to the stay of an admiralty action in favor of arbitration, confirmed the rigidity of the first part of the *Enelow* rule, viz., the action sought to be stayed must sound in law.

*Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), dealt with facts practically identical with *Enelow* and reaffirmed the *Enelow* rule in the face of a challenge that argued that the obliteration of law-equity distinctions by the then recently enacted Federal Rules of Civil Procedure had wiped out any further rational basis for *Enelow* itself. But the turnabout seemed practically complete with *City of Morgantown* v. *Royal Insurance Company*, 337 U. S. 254 (1949) where the Court, holding unappealable a District Court's decision to try the reformation action without a jury ahead of the counterclaim on the policy, was plainly critical of the whole concept of equating stays with 28 U. S. C. §1292(a)(1) injunctions.

*Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 184 (1955) is the last pronouncement of policy by this Court on the subject of the appealability of stays. Since the

format of the underlying action was an action equitable for an accounting which the District Court had refused to stay in favor of arbitration, this Court, of course, was constrained to hold the stay unappealable. However the Court made plain that while *Morgantown* v. *Royal Ins. Co., supra*, controlled the immediate decision, neither *Enelow*, *Ettelson* nor *Shanferoke* were to be in any wise impaired, Reed, J., being careful to stress *Ettelson's* point about the importance of substance and effect in measuring the applicability of present 28 U. S. C. §1292(a)(1):

> "* * * We said [in *Ettelson*] a stay of the complaint until disposition of the fraud issue 'is as effective . . . as an injunction. . . . The statute looks to the substantial effect of the order made.' " (p. 183)

Nevertheless, in spite of its painstaking efforts to restore a pre-*Morgantown* atmosphere, the Courts of Appeals have generally taken *Baltimore Contractors* v. *Bodinger*, *supra*, as exercising a narrowing and restrictive role regarding the appealability of stays. See, e.g., *Jackson Brewing Company* v. *Clarke*, 303 F. 2d 844, 845 (5 Cir. 1962); *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F. 2d 744, 746 (9 Cir. 1961); and *Day* v. *Pennsylvania Ry. Co.*, 243 F. 2d 485, 487 (3 Cir. 1957), which, in a footnote, at page 487, says:

> "4. In the light of this and other language of the Supreme Court in the Baltimore Contractors case it may be doubted whether anything survives of the rule applied in the *Shanferoke Coal & Supply Corp.* case. * * *"

But *Shanferoke* is neither dead nor dying, and the grant or denial of a stay of a law type of action in favor of arbi-

tration is as routinely appealable as the grant or denial of a conventional interlocutory injunction. *Korody Marine Corp.* v. *Minerals & Chemicals Philipp Corporation*, 300 F. 2d 124 (2 Cir. 1962); *E. T. Simonds Construction Co.* v. *Local 1330*, 315 F. 2d 291 (7 Cir. 1963).

The similarity of arbitration to administrative proceedings, in the context of appealability considerations, is striking. Both are extra-judicial systems of adjudication, and the bulk of arbitration to-day is conducted within the framework of statutes more recent in their enactment than the establishment of many of our administrative agencies. If arbitration qualifies, as it always does, as an "equitable defense or counterclaim", there is no rational reason for denying that status to administrative proceedings sought to be favored by the stay of a law type of action.[3] When the administrative agency—here the Civil Aeronautics Board—cannot give money damages, but is endowed with many of the attributes of an equity tribunal, both procedurally and remedially, the appealability case is even stronger than for arbitration.

That the application of Pan American for a stay of this treble damage action, an action at law, *Fleitman* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916), in favor of asserted primary jurisdiction in the CAB, *is* the assertion of a defense, allows of no doubt. Both the District Court and the Court of Appeals concede the possibility of no

[3] Where arbitration proceedings are transposed from the predicate and become the subject of a stay application, the result is unappealable. *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (2 Cir. 1961), *cert. denied*, 368 U. S. 986.

return. Thus Palmieri, D. J., in his opinion of May 22, 1964 (Appendix A, p. 13a):

> "Initial scrutiny and decision by the CAB will insure the application of the agency's expertise to whatever extent the facts require. The issues will thereby be sharpened and clarified to the advantage of the litigants, and of the Court as well, *if any judicial responsibilities remain.*" (emphasis supplied);

and the *per curiam* opinion of the Court of Appeals (Appendix A, p. 3a; 340 F. 2d, at p. 161), somewhat more optimistically:

> "Obviously the stay order, as well as not adjudicating upon plaintiffs' claims, does not finally dispose of the district court suit or *necessarily* preclude a sometime trial in that forum of plaintiffs' claims. * * *" (emphasis supplied).

Until this case, the cases that happened to deal with the appealability of stays favoring administrative proceedings —*Beckhardt* v. *National Power & Light Co.*, 164 F. 2d 199 (2 Cir. 1947); *United Gas Pipe Line* v. *Tyler Gas Service Co.*, 247 F. 2d 681 (5 Cir. 1957); *Day* v. *Pennsylvania Ry. Co.*, 243 F. 2d 485 (3 Cir. 1957); *N. Y., New Haven, etc. Ry. Co.* v. *Lehigh & New England Ry. Co.*, 287 F. 2d 678 (2 Cir. 1961); and *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F. 2d 744 (9 Cir. 1961)[4]—made no

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[4] *American Airlines, Inc.* v. *Forman*, 204 F. 2d 230, 232 (3 Cir. 1953), cert. den. 346 U. S. 806 (1953), in dismissing the appeal from *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F. Supp. 199 (D. N. J. 1951) expressly grounded unappealability on the fact that the District Court order denying a stay in favor of the CAB also granted leave to renew the application after pretrial clarification of issues.

special point about the standing or lack of standing of administrative proceedings as "equitable defenses or counterclaims." Rather their reliance lay in characterizing the particular stays involved as procedural and within the second classification described in *Enelow*, 293 U. S. 379 (1935) at p. 382 as, "• • • a mere stay of proceedings which a court of law, as well as a court of equity may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause • • •." In each of the instances, related or lead cases were already pending as administrative proceedings and the stays presented a procedural synchronization of court action with existing administrative proceedings.

Vastly different is the instant stay which requires Allied to initiate and conclude an administrative proceeding as condition precedent to prosecution of its treble damage action (Appendix A, p. 17a). To be sure, the *per curiam* opinion of the Court of Appeals attempts to characterize the instant stay as a mere "docket order", but the absurdity of such a holding forces ultimate reliance upon a refusal "to equate administrative proceedings which have been allowed priority with historical equity actions" (Appendix A, p. 3a; 340 F. 2d 160, 161).

The latter holding is novel. On any rational basis there can be no justification for such an appealability differentiation between administrative proceedngs and the arbitration which *Shanferoke* equates with equity.

*Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), per Roberts, J., says at pp. 191, 192:

> "As in the *Enelow* case, so here, the result of the District Judge's order is the postponement of trial

> of the jury action * * *; and it may, in practical effect, terminate that action. It is as effective in these respects as an injunction issued by a chancellor."

While appeals from interlocutory orders are indeed not the rule in our federal judicial system, 28 U. S. C. §1292(a)(1)—appeal from interlocutory injunction—is an exception, and, as such, there is no good reason why its scope should be narrower than its fair intendment. In the decade since *Baltimore Contractors* v. *Bodinger*, *supra*, with all of the intervening misunderstanding of its impact, we believe that the question of whether administrative proceedings can be equated with an equitable defense or counterclaim, within the *Enelow-Shanferoke* rule, is of sufficient importance to merit review.

Independently of *Enelow*, is the question whether an order which differs from a conventional injunction only in that compliance is motivated by the desire of the suitors to save their suit rather than an unnecessary contempt sanction, is not an injunction within the meaning of 28 U. S. C. §1292(a)(1). This, too, we think is an important question which ought to be reviewed.

**As to the Mandamus Proceedings in the Court of Appeals (Second Case)**

Since mandamus involves both consideration of what the respondent Judge has done and the availability of the writ as remedy in the given situation, we have divided the argument into what are roughly substantive-jurisdictional and procedural portions. The mandamus application to the Court of Appeals was conditioned to be reached only if the

appeal in the first case was dismissed for unappealability (RM pp. 1-4, 13).

**Primary Jurisdiction**

The underlying substantive question here is whether the Civil Aeronautics Board has or retains the primary jurisdiction of the matters alleged in a treble damage antitrust action where both the agreement, combination and conspiracy, and the implementing acts of misconduct were terminated well before the action was begun, the CAB, of course, being powerless to award money damages, and all parties involved being "air carriers" within the meaning of the Federal Aviation Act of 1958. We think that *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963) has made it clear that an antitrust problem, not involving rates or routing, must have continuing, current impact for the Board to have a primary jurisdictional interest in it.

The Federal Aviation Act of 1958, 72 Stat. 731; 49 U. S. C. §1301, *et seq.*, succeeding the Act of 1938, places the civil aviation transportation industry under regulation and continues the Civil Aeronautics Board as the regulatory agency for that industry, a body which operates by licensing, regulations, etc. In three areas, viz., mergers, consolidations, acquisitions (§408), interlocking relationships (§409), and "pooling and other agreements" between air carriers and any other carriers for, *inter alia*, "controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, * * * or for other cooperative working arrangements" (§412), the Board, by approving, immunizes—to whatever extent nec-

essary—from the antitrust and any other laws which would otherwise apply in derogation of the approved arrangement (§414). With respect to §412, the air carrier party to any such agreement has the statutory duty of filing it with the Board, and any modification or cancellation.

§411 empowers the Board, *sua sponte* or on complaint by an "air carrier, foreign air carrier or ticket agent" to investigate whether any in such category "has been or is engaged in * * * unfair methods of competition in air transportation * * *." If, after hearing, the Board finds that the charged party "is engaged in such * * * unfair methods of competition," it is empowered to issue a cease and desist order.

§1106, the saving clause, declares that nothing in the Act shall abridge existing legal remedies, "but the provisions of this chapter are in addition to such remedies."

Finally there is §404(b) forbidding to air carriers any undue preferencing or discrimination in air transportation with respect to "any particular person * * * or description of traffic." This is the jurisdictional basis for the federal tort cause of action alleged in the complaint—acts of discrimination by Pan American implementing its conspiratorial agreement with Add and encompassed by the treble damage antitrust action, but giving rise to single damages if the conspiratorial elements fail to prove out.

Thus there are two statutory approaches available to the CAB in dealing with the behavior of qualified actors having antitrust implications—the approval-immunization method acting on agreements of air carriers under §§412 and 414, and unfair competitive practice adjudication under

§411. The former, in terms of language alone, seems to imply a role left open for antitrust with respect to unimmunized agreements; the latter is plainly prospective in its remedial impact.

Four lower court decisions antedating *Panagra (Pan American World Airways, Inc.* v. *United States)*, 371 U. S. 296 (1963), have bearing on the question of primary jurisdiction with regard to the CAB, viz., *S. S. W., Inc.* v. *Air Transport Association of America*, 191 F. 2d 638 (D. C. Cir. 1951), *cert. denied*, 343 U. S. 955 (1952); *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F. Supp. 199 (D. N. J. 1951), appeal dismissed and prohibition denied *sub nom. American Airlines, Inc.* v. *Forman*, 204 F. 2d 230 (3 Cir. 1953), cert. den. 346 U. S. 806; *Apgar Travel Agency* v. *International Air Transportation Association of America*, 107 F. Supp. 706 (S. D. N. Y. 1952); and *Fitzgerald* v. *Pan American World Airways, Inc.*, 229 F. 2d 499 (2 Cir. 1956).

Although distinctions can be found, *Slick Airways* is in conflict with the *S. S. W., Inc.* and *Apgar Travel Agency* cases. It holds essentially that a) the conspiratorial, predatory "agreement" violative of the Sherman Act is not the sort of agreement intended to be covered by the approval-immunization procedures of §§412 and 414,[5] and, independently, b) that the relief sought in the action, predominantly treble damages (injunction was also prayed), kept the case

[5] This proposition is not in accord with the position of the CAB which, in *Transcontinental & Western Air, Inc.—Delta Air Lines, Inc., Interchange of Equipment*, 8 C. A. B. 857, 860 (1947), expressed its §412 interest in "all understandings which are, or may become, the basis for concerted action." However, this is not expressive of an interest in agreements which once were, but no longer are, the basis of such action.

in the Court, since the CAB was powerless to give damages. *S. S. W., Inc.* and *Apgar Travel Agency*, on the other hand, hold that the agreements alleged violative of the Sherman Act were subject to the CAB's primary jurisdiction as were all questions of prospective, injunctive remedies, and that the money damage demands would be held in abeyance pending completion of the CAB's proceedings.

What all three cases had in common, in contrast to the instant case, were continuing, current activities under current agreements, with some measure of relief and remedy available in the Board.

*Fitzgerald* v. *Pan American World Airways*, 229 F. 2d 499, 502 (2 Cir. 1956), while not an antitrust case, is both the authority relied upon to establish the federal tort aspect of the case for discrimination in air transportation violative of present §404(b) of the Act, and the inapplicability of the doctrine of primary jurisdiction to past and terminated misconduct. It points out that, unlike acquisitions, interlocking relationships, and agreements covered by present §§408, 409 and 412, there is no immunizing power, under present §414, applicable by the CAB to discrimination violative of §404(b). With respect to past misconduct generally, it argues that inability of the CAB to give the only meaningful remedy—money damages—bespeaks jurisdiction in the courts and not in the CAB.

*Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), the *Panagra* case, is dispositive against a cession of primary jurisdiction to the CAB, and Allied so urged both the District Court and the Court of Appeals. In terms of a time sequence, *Panagra* was dealing

with an acquisition and agreements whose inception, prior to the 1938 enactment, were both legal and unregulated. The opinion made plain that what gave the CAB exclusive primary jurisdiction of the case was the *continuity* of the complained of behavior into the present. The case is studded with observations regarding the inseparable linkage in §§411 and 414 instances, of the CAB's ability to give a meaningful measure of remedy with its exclusive primary jurisdiction. Thus, with regard to §411, 371 U. S. at page 303:

> "The words 'has been or is engaged in unfair * * * practices or unfair methods of competition' plainly include practices started before the 1938 Act and continued thereafter[7] as well as practices instituted after the effective date of the Act."
>
> * * *

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"7. The Sherman Act was applied to pre-1890 combinations: [citing cases].

* * *

"Moreover as we recently stated in United States v. du Pont & Co., 353 U. S. 586, 607, '* * * the test of a violation of §7 is whether, *at the time of suit*, there is reasonable probability that the acquisition is likely to result in the condemned restraints.' (Italics added.)"

and at page 309:

> "In case of a prospective application of the Act, the Board's order, as noted, would give the carrier immunity from antitrust violations 'insofar as may be necessary to enable such person to do anything authorized, approved or required by such order.' §414. Alternatively, the Board under §411 can investigate and *bring to a halt* all 'unfair * * * practices' and all 'unfair methods of competition,' including those

which started prior to the Act." (emphasis supplied).

Followed by:

> "The fact that transactions occurring before 1938 are involved in this case does not change our conclusion. The past is prologue and the impact of pre-1938 transactions *on present problems* of air carriers is eloquently demonstrated * * *. The status of Panagra—jointly owned by Pan American and Grace—is central to that problem * * *. What was done in the pre-1938 days may be so disruptive of the regime visualized by the Act or so out of harmony with the standards for competition set by the Act that it should be *undone* in proceedings under §411. The transactions in question are reached by the terms of §411. But more important, the particular relation of this problem to the general process of encouraging development of new fields of air transportation makes it all the more appropriate that the Board should decide whether these particular transactions *should be undone* in whole or in part, or whether they should be *allowed to continue*." (page 310, emphasis added)

With regard to the necessity of some remedial function to sustain jurisdiction, this Court said, per Douglas, J., at pages 305, 6:

> "* * * The case is therefore quite unlike *Georgia* v. *Pennsylvania R. Co., supra* [324 U. S. 439], where a conspiracy among carriers for the fixing of through and joint rates was held to constitute a cause of action under the antitrust laws, in view of the fact that the Interstate Commerce Commission has no power to grant relief against such combinations.[11]"

and at pages 311, 312:

> "It is suggested that the power of the Board to issue a 'cease and desist' order is not broad enough to include the power to compel divestiture and that in any event its power to do so under §411 runs solely to air carriers, not to common carriers or other stockholders. We do not read the Act so restrictively. *The Board has no power to award damages* or to bring criminal prosecutions. Nor does it, as already noted, *have jurisdiction over every antitrust violation by air carriers.* But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil *at hand.*" (emphasis added).

All of the foregoing was urged to the respondent Judge, as was the District Court opinion in *Trans World Airlines, Inc.* v. *Hughes,* 214 F. Supp. 106, 111, 112 (S. D. N. Y. 1963), affd. in part, 332 F. 2d 602 (2 Cir. 1964), *cert. dismissed* March 8, 1965, — U. S. —, particularly that portion referring to antitrust jurisdiction remaining in the courts where money damages are sought and "the agency has no power to grant relief • • •".

Finally Allied urged that under the "dominant allegation" test of *S. S. W., Inc.*, 191 F. 2d 658, 662 (D. C. Cir. 1951), *cert. denied*, 343 U. S. 955, and *U. S. Navigation Company* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932), the unimportant destruction of credit allegations, which could be deleted without in any way impairing the sufficiency of the complaint, should not be used as a handle to

throw the case into the primary jurisdiction of the Board. These allegations, relating to unilateral actions of Pan American long after the antitrust and tort activities had ceased, we said, were clearly and easily severable if the Court below felt that the CAB had the primary jurisdiction of them (RM pp. 51-53).

The District Court nevertheless, in its opinion of May 22, 1964 (Appendix A, pp. 12a-14a), laid great—perhaps controlling—stress on these minor allegations as providing a current problem connection for drawing the whole terminated antitrust and tort complex into the primary jurisdiction of the Board. In spite of *Panagra's* explicit finding of the inseparability of remedy and jurisdiction, the opinion relied heavily on an inaccurate *obiter* from *Apgar Travel Agency, supra*,[6] (Appendix A, p. 12a) to hold that, while the CAB could afford Allied no practicable remedy, Allied must nevertheless first "exhaust its available remedies" before the Board. Conceding that the Court had been unable to discover any instance in which the CAB had exercised its powers under §412 with respect to contracts, agree-

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[6] The quoted portion of *Apgar*, 107 F. Supp. 706, 711, seems to say that, lacking ability to grant a remedy, an agency's expertise is sufficient sole ground for its primary jurisdiction. But examination of footnote 17 of that opinion shows basic referral to the exclusive rate making power of the I. C. C.—much more nearly akin to subjects "directly within the ambit of powers explicitly granted to the Board by the Congress", *Trans World Airlines, Inc.* v. *Hughes*, 332 F. 2d 602, 608 (2 Cir. 1964). Hence the more accurate statement would be that, in the interests of uniformity of regulation—where uniformity is required—the courts cannot intrude into areas exclusively mandated to an agency, e.g. determination of reasonable rates and routing practices. For conduct of the sort here, wholly terminated, the Board has neither remedy, Congressional mandate, nor primary jurisdiction. *Trans World Airlines, Inc.* v. *Hughes, supra*, at page 609.

ments or understandings already terminated (Appendix A, p. 14a). the Court went on to say that it was "not clear" that the CAB would decline to disapprove the "agreement" under §412(b); this notwithstanding that it is only with respect to orders of approval that immunity is gained. Thus, in this Clayton Act treble damage action, the issues would be "sharpened" for the Court by the CAB's expertise—"if any judicial responsibilities remain" (Appendix A, p. 13a), and the "Board, upon being confronted with matters that have already run their course, might well exploit the occasion for future guidance of the industry" (Appendix A, p. 14a).

Allied moved for reargument on the basis of the appellate opinion in the then newly decided *T. W. A.* v. *Hughes* case, *supra*, pointing out the significance of that decision in the delineation of matters exclusively mandated to the Board, to the Courts, and the area of concurrent jurisdiction; the relationship of remedy to jurisdiction, the jurisdictional significance of termination of a relationship otherwise regulated, etc. (RM pp. 62, 63). In the motion for reargument, Allied announced that it was dropping the destruction of credit allegations from the complaint. Nevertheless the Court adhered to its original determination, observing that the deletion amendment would not "compel a different result in view of all that was said in that opinion, and particularly those portions of the opinion relating to allegedly illegal practices which terminated prior to this action" (Appendix A, p. 21a). Thus, while destruction of credit was the only §411 entry with which to pipe the terminated antitrust and tort misconduct into the Board's jurisdiction (Appendix A, p. 14a), only a clearly incorrect prem-

ise of power to disapprove under §412(b)—irrelevant to §414 immunization never obtained—remained to justify the Court's cession of primary jurisdiction. This was clearly no justification.

The *per curiam* opinion of the Court of Appeals (Appendix A, pp. 1a-4a; 340 F. 2d 160) carefully refrains from passing on the merits of the order below (Appendix A, pp. 16a, 17a). Although the stricture of that order is plain: "* * * this action and all proceedings therein be and the same are hereby stayed until plaintiffs exhaust their available remedies before the Civil Aeronautics Board," the *per curiam* opinion strongly hints that exhaustion may perhaps come from the Board and easily at that:

> "The order below only provides that the case is not to be brought forward on the docket until the Board is given an opportunity to consider what, if any, attention it may accord the litigation, and has exhausted that opportunity." (Appendix A, p. 3a; 340 F. 2d at p. 161)

Needless to say the opinion of an administrative agency as to whether it has or has not power or jurisdiction to deal with a given problem is not the last word. *Panagra*, 371 U. S. 296, 311 (ftn. 15), 327. Judge Palmieri certainly thought that he was acting in an area of discretion:

> "In sum, until the Board has the opportunity to rule, it is wiser for this Court to withhold any action. * * *" (Appendix A, p. 14a)

Important questions of the extent of discretion, if any, in this area are thus posed as well as the limits beyond which it is abused. We think that the cession of primary

jurisdiction of this treble damage action for terminated antitrust activity was plainly wrongful and erroneous.

**The Availability of the Writ**

It would seem practically a self-demonstrable proposition that a district judge, wrongfully ceding away the exclusive original jurisdiction of the district courts over a treble damage Clayton Act action, triable by a jury, is answerable to mandamus, in the absence of the availability of the more usual modes for the correction of error.

> *McClellan* v. *Carland*, 217 U. S. 268 (1910);
> *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959);
> *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957);
> *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184 (2 Cir. 1955), *cert. denied* 350 U. S. 825;
> *Mach-Tronics, Incorporated* v. *Zirpoli*, 316 F. 2d 820 (9 Cir. 1963);
> *California* v. *Federal Power Commission*, 369 U. S. 482 (1962);
> *Lummus Company* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (2 Cir. 1961), *cert. denied*, 368 U. S. 986.

Having decided that the case was unappealable, the Court of Appeals gave shockingly short shrift to Allied's seriously intended application for mandamus and uttered a grossly over-simplified, out of context, "rule" of mandamus (Appendix A, p. 4a; 340 F. 2d at 161):

> "This attempt to obtain an immediate resolution by us of the propriety of an unappealable order is

> denied, for mandamus is 'meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" . . .' *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953). This is not such a case.
>
> See *Slick Airways, Inc.* v. *American Airlines, Inc. et al.*, cited also as *American Airlines, Inc. et al.* v. *Forman, Judge*, 204 F. 2d 230 (3 Cir. 1953), *cert. denied*, 348 U. S. 806."

*Banker's Life, supra*, was speaking to a venue case and the quoted portion was addressed to those improprieties of judicial behavior which cannot be let go by if the semblance of the rule of law is to be maintained. More giving of the rationale of mandamus, with respect to questions of jurisdiction, which is of course the question involved here, is page 382 of *Bankers Life*, where Clark, J., said:

> "As was pointed out in *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943), the 'traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior to a lawful exercise of its prescribed jurisdiction *or to compel it to exercise its authority where it is its duty to do so.*'" (emphasis supplied)

The citation by the *per curiam* opinion herein of *American Airlines, Inc.* v. *Forman*, 204 F. 2d 230 (3 Cir. 1953), *cert. denied* 348 U. S. 806, presupposes a symmetry of treatment between the wrongful cession and the wrongful retention—"usurpation"—of jurisdiction, notwithstanding the vast differences in consequences between the two. A wrongful cession, at the threshold, of jurisdiction of a

treble damage action that rightfully ought to have been retained defeats the original exclusive jurisdiction of the district court (*McClellan* v. *Carland*, 217 U. S. 268, 281-282 (1910); *Lyons* v. *Westinghouse Electric Corp.*, 222 F. 2d 184, 189 (2 Cir. 1955), *cert. denied*, 350 U. S. 25; *Mach-Tronics, Inc.* v. *Zirpoli*, 316 F. 2d 820, (9 Cir. 1963) at 834, footnote 20); the appellate jurisdiction of the court of appeals (*Bankers Life, supra; Roche Evaporated Milk Assn.*, 319 U. S. 21, 26, 32 (1943)); and the rights of the litigants to the trial of their whole case to court (*La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957)) and jury (*Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959)).[7]

None of the foregoing considerations mark the case which is erroneously retained although rightfully belonging to some other jurisdiction. Sooner or later such a case will come up through normal appeal channels and appellate courts can, reserving mandamus for gross abuse or usurpation, both be solicitous of the sensibilities of conscientious judges and avoid a premature review of merits. In that context, *American Airlines, Inc.* v. *Forman*, 204 F. 2d 230, 232 (3 Cir. 1953), *cert. denied*, 348 U. S. 806, makes sense:

> "• • • If, after exercising professional skill and judgment in working through a process of this sort a court decides rightly or wrongly, *that it has jurisdiction*, it is most unlikely that the judge will have merited that peremptory admonition which is reserved principally for cases of abuse or gross misuse of power." (emphasis added)

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[7] No answer having been served in the action stayed, the case is still open to jury demand as of right under §38(b) of the Federal Rules of Civil Procedure.

Ultimately, however, courts serve to administer the law, not to serve their administrators. And where mandamus alone can preserve the original and appellate jurisdiction of the federal courts, and the basic rights of litigants, it cannot be withheld.

However merely procedural this "docket order" has been characterized, the importance of the issues involved precluded the Court of Appeals from refusing to review the merits of the stay. This Court has said, in *California* v. *Federal Trade Commission*, 369 U. S. 482, 490 (1962):

> "• • • Where the primary jurisdiction is in the agency, courts withhold action until the agency has acted. *Texas & Pac. R. Co.* v. *Abilene Oil Co.*, 204 U. S. 426. The converse should also be true, lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by the Federal Power Commission. • • •"

The matched appeal and conditional application for mandamus is not uncommon. Except for the instant case, in practically every instance where the district court has stayed an action—ceded jurisdiction—, the Court of Appeals has reviewed the merits of the stay and granted or denied mandamus on that basis, e.g., *United Gas Pipe Line* v. *Tyler Gas Service Co.*, 247 F. 2d 681 (5 Cir. 1957); *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F. 2d 744 (9 Cir. 1961); and *Lyons* v. *Westinghouse Electric Corporation*, 222 F. 2d 184 (2 Cir. 1955), *cert. denied*, 350 U. S. 825. Only here, and in apparent conflict with its own holding in *Lyons*, has the Court of Appeals refused to review the merits of such an order.

We feel that an important question of federal law exists with respect to that refusal, additionally to the main question of whether the Court of Appeals was bound by the applicable decisions of this Court to issue mandamus.

**Wherefore, it is respectfully prayed that a writ of certiorari be granted to review the judgment, covering both cases, of the United States Court of Appeals for the Second Circuit.**

April, 1965

Respectfully submitted,

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**Appendix A—Opinions, Orders and Judgment**

## OPINION OF THE COURT OF APPEALS, JANUARY 13, 1965 (340 F. 2d 160)

## UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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September Term, 1964.
(Argued December 7, 1964 Decided January 13, 1965.)
Docket Nos. 29016, 29225

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
*Plaintiffs-Appellants,*

—v.—

PAN AMERICAN WORLD AIRWAYS, INC.,
*Defendant-Appellee.*

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In the Matter of the Application of
ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
*Petitioners,*

for an order in the nature of a writ of mandamus directed to the HONORABLE EDMUND L. PALMIERI, United States District Judge for the Southern District of New York,
*Respondent.*

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Before:

WATERMAN, MOORE and KAUFMAN,
*Circuit Judges.*

Motion by defendant to dismiss for lack of appellate jurisdiction; motion by plaintiffs to proceed *in forma pauperis* and upon typewritten papers, and motion for issuance of a writ of mandamus in the event that motion to dismiss appeal is granted. Motion to proceed *in forma pauperis* and upon typewritten papers and motion for issuance of a writ of mandamus denied; motion to dismiss granted.

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MILTON HOROWITZ, New York City, *for plaintiffs-appellants in No. 29016 and for petitioners in No. 29225.*

CLEARY, GOTTLIEB, STEEN & HAMILTON (Fowler Hamilton, George Weisz, of counsel), New York City, *for defendant-appellee in No. 29016 and for respondent in No. 29225.*

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PER CURIAM:

Allied Air Freight, Inc. and Allied Air Freight International Corp. seek to appeal from an order of the district court below that does not finally adjudicate the merits of plaintiffs' claim that defendant is liable to them in treble damages under Sections 1 and 2 of the Sherman Antitrust Act and Section 4 of the Clayton Act.

In the belief that the nature of plaintiffs' allegations are such that the Civil Aeronautics Board should have an opportunity to decide whether it may wish to consider them, the court below, in a lengthy opinion discussing the authorities in the primary jurisdiction area, stayed the antitrust

action until plaintiffs should exhaust their available remedies before the CAB.

Obviously, the stay order, as well as not adjudicating upon plaintiffs' claims, does not finally dispose of the district court suit or necessarily preclude a sometime trial in that forum of plaintiffs' claims. The order below only provides that the case is not to be brought forward on the docket until the Board is given an opportunity to consider what, if any, attention it may accord the litigation, and has exhausted that opportunity.

This type of docket order in a case which defers action for the time being is not an injunction order contained within an interlocutory order at law such as to permit an appeal from the granting or the denial of an injunction pursuant to 28 U. S. C. §1292(a)(1). See 6 Moore, Federal Procedure §54.07 at p. 48. Such an order is only a step in the action. See majority and concurring opinions in *Armstrong-Norwalk Rubber Corp.* v. *Local Union No. 283*, 269 F. 2d 618 (2 Cir. 1959). Under Section 1292(a)(1) an order staying proceedings, to be appealable, must have stayed a legal action to allow prior trial of an equitable defense or counterclaim. See *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955); *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935). But the weight of authority has refused to equate administrative proceedings which have been allowed priority with historical equity actions. *New York, N. H. & H. R.R.* v. *Lehigh & New England R.R.*, 287 F. 2d 678 (2 Cir. 1961); *Chronicle Publishing Co.* v. *National Broadcasting Co.*, 294 F. 2d 744 (9 Cir. 1961). Recognizing this to be so, plaintiffs-appellants twice

sought from the presiding judge an interlocutory appeal certificate pursuant to §1292(b) which was twice refused.

Therefore, for lack of appellate jurisdiction, we grant defendant's motion to dismiss plaintiffs' purported appeal.

Plaintiffs also petition us to permit them to prosecute their appeal *in forma pauperis* and upon typewritten papers. As we have ordered that their appeal be dismissed, we dismiss this petition as moot.

Plaintiffs have also petitioned us to issue an order in the nature of a writ of mandamus directed to the judge below to vacate his stay order. This attempt to obtain an immediate resolution by us of the propriety of an unappealable order is denied, for mandamus is "meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power' . . ." *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953). This is not such a case.

See *Slick Airways, Inc.* v. *American Airlines, Inc. et al.*, cited also as *American Airlines, Inc. et al.* v. *Forman, Judge*, 204 F. 2d 230 (3 Cir. 1953), *cert. denied*, 348 U. S. 806.

*Appendix A—Opinions, Orders and Judgment*

## JUDGMENT OF THE COURT OF APPEALS, JANUARY 13, 1965

### UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of January, one thousand nine hundred and sixty-five.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
*Circuit Judges.*

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
Plaintiffs-Appellants,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,
Defendant-Appellee.

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
Petitioners,

v.

HON. EDMUND L. PALMIERI, U. S. D. J., for the Southern District of New York,
Respondent.

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Motions having been made herein by counsel for the appellee to dismiss the appeal for lack of jurisdiction and by counsel for the appellants to dispense with printing their brief and appendix as well as for a writ in the nature of petition for a writ of mandamus,

Upon consideration thereof, it is

Ordered that said motion to dismiss the appeal be and it hereby is granted and that the appeal from the United States District Court for the Southern District of New York be and it hereby is dismissed.

Further ordered that the motions for leave to dispense with printing appellants' brief and appendix and for a writ in the nature of a writ of mandamus be and they hereby are denied.

A. DANIEL FUSARO
Clerk

A true copy,

/s/ A. DANIEL FUSARO
Clerk

*Appendix A—Opinions, Orders and Judgment*

## OPINION OF DISTRICT COURT, MAY 22, 1964

#29989

64 Civil 86

## UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

Plaintiff,

*against*

PAN AMERICAN WORLD AIRWAYS,

Defendant.

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PALMIERI, J.

The defendant moves pursuant to Rule 12(b)(1), Fed. R. Civ. P., for a dismissal of this action brought under Sections 1 and 2 of the Sherman Antitrust Act and Section 4 of the Clayton Act, or, in the alternative, for a stay, on the ground that primary jurisdiction is vested in the Civil Aeronautics Board (CAB), *S. S. W., Inc.* v. *Air Transport Association of America*, (D. C. Cir. 1951) 191 F. 2d 685, *cert. denied*, 343 U. S. 955 (1952); *Apgar Travel Agency* v. *International Air Transport Association*, 107 F. Supp. 706 (S. D. N. Y. 1952); *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963);[1] *contra*, *Slick Airways, Inc.* v. *American Airlines, Inc.*, 107 F. Supp. 199 (D. N. J. 1951), *appeal dismissed*, 204 F. 2d 230 (3d Cir. 1953), *cert. denied*, 346 U. S. 806.

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[1] See discussion of this decision in 77 Harv. L. Rev. 163 (1963); 63 Colum. L. Rev. 923 (1963).

Plaintiff Allied Air Freight, Inc. (Allied)[2] is a bulk shipper of air freight. It makes its profit by collecting small amounts from individual shippers, consolidating them into one large shipment, and retaining as profit the difference between the rates it charges to shippers and the lower, bulk shipment rates which it pays to the carrier airline. The complaint alleges that from August 10, 1962 to the spring of 1963, Pan American World Airways (Pan American) conspired with Add Airfreight (Add), a competitor of plaintiff, to monopolize the air freight business between New York and Puerto Rico to the serious detriment of plaintiff. It further alleges that the conspiracy between Pan American and Add terminated only when Add transferred its business from Pan American to a competing carrier. And now, after the conspiracy has ended, it is alleged by Allied that Pan American continues to seek its destruction by attempting to destroy its credit.

Allied seeks to recover judgment from Pan American in the amount of $3,000,000—three times the damages which it claims it suffered by reason of Pan American's allegedly unlawful acts.

Essentially, the issue is whether this Court or the CAB has primary jurisdiction over the suit. Where broad powers of regulation and control are conferred upon administrative agencies, this doctrine is applied in order to avoid conflicts and inconsistencies between them and the courts, and in order to insure uniformity of treatment and regula-

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[2] While there are in fact two plaintiffs, they are so closely interrelated and integrated, having common ownership, officers, administration and operation, that they will be referred to throughout this opinion in the singular, or by the collective term "Allied."

tion. Its ultimate aim is thus to make of the courts and the regulating bodies "collaborating instrumentalities of justice," the "appropriate independence of each" being "respected by the other,"[3] so that the standards applied by them in the same general field can be concordant.[4]

The doctrine of primary jurisdiction has become an important part of the field of federal jurisdiction since it was enunciated by the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907). The doctrine has been extended to practices of railroads under the Interstate Commerce Act, 49 U. S. C. §1 *et seq.*; *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477 (1918); and to practices of steamship companies under the Shipping Act of 1916, 46 U. S. C. §801 *et seq.*; *United States Navigation Co* v. *Cunard Steamship Co.*, 284 U. S. 474 (1932). It has been applied in both private[5] and government[6] anti-trust suits affecting the air transport industry.

The Civil Aeronautics Act of 1938, 49 U. S. C. §401 *et seq.*, the basic statute governing control of air carriers, as well as its successor statute, the Federal Aviation Act, 49 U. S. C. §1301 *et seq.*, conferred upon the CAB broad

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[3] The quoted language is borrowed from the opinion of Justice Frankfurter in *United States* v. *Morgan*, 313 U. S. 409, 422 (1941).

[4] See Note, 63 Colum. L. Rev. 923 (1963), which discusses the primary jurisdiction doctrine in its relation to the CAB, as well as the decision in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963).

[5] *S. S. W., Inc.* v. *Air Transport Association of America, supra*; *Apgar Travel Agency* v. *International Air Transport Association, supra.*

[6] *Pan American World Airways, Inc.* v. *United States, supra.*

powers and duties for both promoting and regulating air transportation. Congress has prescribed that the exercise of these functions should be carried out in pursuit of multiple objectives—safety in air transportation, sound economic conditions in the industry, its proper adaptation to the needs of the foreign and domestic commerce of the United States, the Postal Service, and the national defense, Federal Aviation Act §102(d), 49 U. S. C. §1302(d); Caves, Air Transport and its Regulators, Chapter 6, (Harvard University Press, 1962). Competition is to be employed "to the extent necessary." These powers were granted pursuant to a policy which declared uniform control of this industry to be in the public interest and which further declared that unrestrained competition in this industry was not consonant with its efficient development.[7] Almost as a necessary corollary to the implementation of this policy, Congress extended to the CAB the power to immunize industry practices from the effects of the antitrust laws when such immunization would benefit the public and the industry. Federal Aviation Act §414; 49 U. S. C. §1384.

Against this impressive background of power and regulation, the doctrine of primary jurisdiction is readily applicable. The issues raised by the complaint appear on their face to fall within the jurisdiction of the CAB. The

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[7] It was said in S. Rep. No. 1661, 75th Cong., 2d Sess., page 2, "competition among air carriers is being carried to an extreme, which tends to jeopardize the financial status of air carriers and to jeopardize and render unsafe a transportation service appropriate to the needs of commerce and required in the public interest. . . ."

alleged agreement between Pan American and Add for the purpose of securing a monopoly of air freight carriage between New York and Puerto Rico is one subject to Section 412 of the Federal Aviation Act (49 U. S. C. §1382) which gives the CAB full authority to approve or disapprove of any agreements between air carriers[8] in accordance with the standards of the Federal Aviation Act. Moreover, the allegations of destructive and harassing tactics by defendant could have been the subject matter of a complaint before the CAB under Section 411 of the Federal Aviation Act (49 U. S. C. §1381) which gives it broad plenary powers of investigation into "unfair or deceptive practices or unfair methods of competition," charging it with the obligation to order any air carrier engaged in such practices or methods of competition to "cease and desist" therefrom.[9]

The plaintiff does not deny the force of these applicable regulatory statutes but it seeks to avoid their impact here. Plaintiff's contentions can be summarized as follows: (1) that the action is for money damages which the CAB is powerless to give; (2) that the alleged agreement of Pan American and Add and the actions taken pursuant to it

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[8] It has long been settled that freight forwarders are air carriers. "There is no dispute that an air freight forwarder is an air carrier." *National Air Freight Forward. Corp.* v. *CAB*, 197 F. 2d 384, 386 (D. C. Cir. 1952). See also *Railway Express Agency, Grandfather Certificate*, 1941, 2 C. A. B. 531; *Universal Air Freight Corp., Investigation*, 1942, 3 C. A. B. 698; 49 U. S. C. §1301(3).

[9] In this connection it is of interest to note Paragraph 26 of the Complaint which states: "Only the informal intervention of personnel of said Civil Aeronautics Board, at the urgent request therefor by Allied, broke the embargo and led to more equitable carriage by defendant of Allied's freight."

were terminated in 1963 and that any reference to the CAB would be futile; and (3) that there can be no conflict here between the Court and the regulatory agency since the latter can only deal with current matters with respect to which it has a prospective remedial function to exercise, and that no such frame of reference exists here.

None of these arguments is persuasive. The inability of the CAB to award money damages was expressly considered in the *Apgar* and *S. S. W.* cases, *supra*, as a basis for withholding recognition of the primary jurisdiction doctrine, and was rejected. In both cases, referral to the agency was made, not for remedial purposes, but to insure uniformity of regulation where specialized experience and expert competence were necessary because of the presence of problems affecting the industry. *Apgar Travel Agency* v. *International Air Transport Association*, 107 F. Supp. 706, 711 at n. 17 (S. D. N. Y. 1952). The priority of jurisdiction by the administrative agency is conditioned "not upon the ability of the administrative agency to grant a remedy, but upon the presence of problems calling for the kind of consideration which only the administrative agency is in a position to give." *Id.* at 711.

The plaintiff further contends that since most of the allegations of the complaint deal with matters which have now been terminated, referral to the CAB would be improper and unnecessary; and that the doctrine of primary jurisdiction can, at best, apply only to the destruction of credit allegations which are of a continuing nature and which are severable from the rest of the complaint. *Com-*

*pare McCleneghan* v. *Union Stock Yards Co. of Omaha*, 298 F. 2d 659 (8th Cir. 1962).

This contention must be rejected for several reasons. At the outset, any attempt to parcel out or divide responsibilities between the CAB and the courts would be cumbersome and difficult to accomplish. Instead of furthering the harmonious development of the law in this sensitive area, such a policy would frustrate it and jeopardize the integrity of the regulatory scheme enacted by Congress. Moreover, primacy of jurisdiction in the context of this case means that the CAB has the prior, but not the exclusive right to deal with the matter. Initial scrutiny and decision by the CAB will insure the application of the agency's expertise to whatever extent the facts require. The issues will thereby be sharpened and clarified to the advantage of the litigants, and of the Court as well, if any judicial responsibilities remain.[10] Simultaneous efforts by both the Court and the CAB in the same litigation, as the plaintiff here suggests, would invite confusion and increase the risk of disparate and discordant results.

The significance of the termination of the alleged illegal agreement between Pan American and Add, as well as most of the activities imputed to the defendant, presents a more troublesome question but leaves the result unchanged. The administrative policy of the CAB in dealing with expired

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[10] The Board's decisions under Section 411 of the Federal Aviation Act (49 U. S. C. §1381), which deals with unfair or deceptive practices and unfair methods of competition, are subject to judicial review. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U. S. 79, 85 (1956).

agreements under its Section 412[11] powers, if there were such a policy, would be of interest in this connection. But this Court has been unable to discover any instance in which the CAB exercised its powers under Section 412 with respect to contracts, agreements or understandings already terminated. Whether this is purely fortuitous or represents a policy evolved *sub silentio* is not apparent. In any event, the allegations of continuing harassment of plaintiff through the alleged destruction of credit provide a clear basis for invoking the Section 411[12] powers of the CAB. It would seem unavoidable that all the related issues between the parties would in such case come under the Board's scrutiny. Even if this were not to occur, it is not clear that the CAB would decline to rule under Section 412(b)[13] that a contract or agreement was "adverse to the public interest," or in violation of the Federal Aviation Act, solely because it had already terminated. To borrow an expression from the Court's opinion in *Pan American World Airways* v. *United States*, *supra* at p. 310, "the past is prologue," and the Board, upon being confronted with matters that have already run their course, might well exploit the occasion for future guidance in the industry. In sum, until the Board has the opportunity to rule, it is wiser for this Court to withhold any action.[14]

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[11] Section 412 Federal Aviation Act (49 U. S. C. §1382).

[12] Section 411 Federal Aviation Act (49 U. S. C. §1381).

[13] Section 412(b) Federal Aviation Act (49 U. S. C. §1382(b)).

[14] See *Pan American World Airways* v. *United States*, *supra* at 313, note 19.

It follows, therefore, that this action should be stayed until the plaintiff exhausts its available remedies before the CAB.

Submit order on notice.

Dated: New York, N. Y.
May 22, 1964

/s/ Edmund L. Palmieri
EDMUND L. PALMIERI
U. S. D. J.

*Appendix A—Opinions, Orders and Judgment*

## ORDER OF DISTRICT COURT, JUNE 1, 1964

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Civ. 86

---

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

Plaintiffs,

*against*

PAN AMERICAN WORLD AIRWAYS,

Defendant.

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Defendant having duly moved pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for a dismissal of the action, or, in the alternative, for a stay, on the ground that primary jurisdiction herein is vested in the Civil Aeronautics Board, and the said motion having come on to be heard before this Court on April 14, 1964, and CLEARY, GOTTLIEB, STEEN & HAMILTON, ESQS., having appeared and argued for the motion, and MILTON HOROWITZ, ESQ., attorney for the plaintiffs, having appeared and argued in opposition thereto,

Now, upon reading and filing the Notice of Motion herein dated March 10, 1964 and the Complaint herein dated January 8, 1964 annexed thereto, together with proof of due service thereof, and due deliberation having been had

thereon and the Court having filed its written opinion and decision herein, dated and filed May 22, 1964, it is

On motion of CLEARY, GOTTLIEB, STEEN & HAMILTON, Esqs., attorneys for defendant,

ORDERED that the said motion of the defendant be and it hereby is granted to the extent that this action and all proceedings therein be and the same are hereby stayed until plaintiffs exhaust their available remedies before the Civil Aeronautics Board.

Dated: New York, N. Y., June 1, 1964.

s/ EDMUND L. PALMIERI
U. S. D. J.

## MEMORANDUM OPINION, JUNE 2, 1964, ENDORSED ON ORDER OF JUNE 1, 1964

June 2, 1964:

In signing this counterorder and in declining to sign the direct order I have done so because the plaintiffs have added to the foot of their order a certificate pursuant to 28 U. S. C. §1292(b) for the purpose of seeking leave from the Court of Appeals to take an immediate interlocutory appeal from the decision of this Court; and further, because I am convinced that the criteria governing the Court's decision with respect to the granting of such relief and contained in the statute referred to, have not been met in this case.

s/ Edmund L. Palmieri
EDMUND L. PALMIERI

Filed June 2, 1964

U. S. District Court
S. D. of N. Y.

Counterorder dated June 1, 1964, filed June 2, 1964

*Appendix A—Opinions, Orders and Judgment*

## OPINION AND ORDER OF DISTRICT COURT, JULY 15, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#30180

64 Civil 86

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

Plaintiffs,

*against*

PAN AMERICAN WORLD AIRWAYS,

Defendant.

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PALMIERI, J.

The plaintiffs move for leave to reargue a motion made by defendant and granted by this Court on June 1, 1964, pursuant to its opinion dated May 22, 1964. This decision, which is now being appealed by plaintiffs, stayed the action of plaintiffs until their remedies before the Civil Aeronautics Board were exhausted. The basis for plaintiffs' present motion is that a recent decision of the Court of Appeals, decided on June 2, 1964, *Trans World Airlines, Inc. v. Howard R. Hughes*, Docket Nos. 28405-6, requires a denial of the motion previously granted, or alternatively, a cer-

tificate pursuant to 28 U. S. C. §1292(b) for the purpose of seeking leave from the Court of Appeals to take an immediate interlocutory appeal from the decision of this Court. Such a certificate was denied by this Court by its order and memorandum of June 1, 1964.

It should be noted that the recent Court of Appeals decision relied on by plaintiffs was an affirmance of a District Court decision in *Trans World Airlines, Inc.* v. *Hughes*, 214 F. Supp. 106 (S. D. N. Y. 1963), which was argued to this Court by both sides. The affirmance adopts substantially the reasoning of the lower court. It follows, therefore, that since the elements of the Court of Appeals decision were before this Court on the original argument, the plaintiffs' present motion cannot be considered to rest on new authority. More than this, however, the Court of Appeals decision is based upon a readily distinguishable fact situation. The transactions there involved were between non-competing parties in an area not subject to CAB regulation whereas this case involves alleged illegal practices of competing carriers within the area of CAB regulation and control. In distinguishing the Supreme Court's decision in the *Panagra* case,[1] a decision much bruited both in the recent *TWA* case and in the case before this Court, the Court of Appeals had this to say (pp. 2173-74 of slip sheet opinion):

> . . . The unlawful division of territories and allocation of routes with which Pan American, Grace

[1] *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963).

and Panagra were accused were therefore directly within the ambit of powers explicitly granted the Board by the Congress. To permit the courts to intrude into this area would have been, as the Court noted, to permit the erection of an independent yet parallel body of law in direct contravention of the regulatory scheme embodied in the Aviation Act.

By contrast, in the instant case TWA's complaint alleges transactions which are unrelated to any specific function of the CAB. The Board is explicitly entrusted with the duty of considering for approval any potential acquisition of control over an air carrier by a person engaged in any phase of aeronautics; and to the extent of such approval—but only to that extent—the Act grants immunity from the operation of the antitrust laws. Surely Congress did not contemplate that CAB approval of an acquisition would be tantamount to approval of every transaction which might be entered into by the controlling party.

Since the Court of Appeals denied the existence of any CAB jurisdiction, primary or otherwise, over the transactions complained of in the *TWA* case, whereas the allegations in the Complaint before this Court raise questions clearly within the functions entrusted to the CAB by Congress, there is no valid basis for reaching a result different from the one already expressed in this Court's opinion of May 22, 1964. Nor can the plaintiffs' presently announced intention to delete portions of the Complaint compel a different result in view of all that was said in that opinion, and particularly those portions of the opinion relating to allegedly illegal practices which terminated prior to this action.

The plaintiffs' motion for reargument is granted; in all other respects the plaintiffs' motion is denied.

IT IS SO ORDERED.

Dated: New York, N. Y.
July 15, 1964

/s/ Edmund L. Palmieri
EDMUND L. PALMIERI
U. S. D. J.

## Appendix B—Texts of Statutes Involved

1. *Bearing on the appealability issue (first case):*

Judicial Code, 72 Stat. 1770; 28 U. S. C. §1292(a)(1)

"*§1292. Interlocutory decisions*

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

2. *Bearing on the mandamus application to the Court of Appeals (second case)*

a) The substance of the causes of action

Sherman Act, §§1 and 2; 26 Stat., as amended; 15 U. S. C. §§1 and 2

"§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing

minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make unlawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with

foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Clayton Act, §4; 38 Stat. 731; 15 U. S. C. §15

"Suits by persons injured; amount of recovery

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Aviation Act of 1958, §404(b); 72 Stat. 760, Title IV, §404(b); 49 U. S. C. §1374(b)

DISCRIMINATION

Sec. 404(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

b) The issue of primary jurisdiction

Federal Aviation Act of 1958; 72 Stat. 769, Title IV, §411; 49 U. S. C. §1381

"Methods of competition

Sec. 411. The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

72 Stat. 770, Title IV, §§412 and 414; 49 U. S. C. §§1382 and 1384

"Pooling and Other Agreements

Filing of agreements required

Sec. 412. (a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and im-

proving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

Approval by Board

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it."

"Legal Restraints

Sec. 414. Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

72 Stat. 798, Title XI, §1106; 49 U. S. C. §1506

"Remedies Not Exclusive

Sec. 1106. Nothing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

62 Stat. 931; 28 U. S. C. §1337

"§1337. Commerce and anti-trust regulations

The district courts shall have original jurisdiction of any civil action or proceeding under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

c) The availability of mandamus

All Writs Act; 62 Stat. 944 as amended by 63 Stat. 102; 28 U. S. C. §1651

"§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Rule 81(b), Federal Rules of Civil Procedure

"(b) *Scire Facias and Mandamus.* The writs of scire facias and mandamus are abolished. Relief heretofore obtainable by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

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MAY 6 1965
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

No. 1042

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
*Petitioners,*
*against*
PAN AMERICAN WORLD AIRWAYS, INC.,
*Respondent.*

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,
*Petitioners,*
*against*
HONORABLE EDMUND L. PALMIERI, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1964**

No. 1042

ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

*Petitioners,*

*against*

PAN AMERICAN WORLD AIRWAYS, INC.,

*Respondent.*

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ALLIED AIR FREIGHT, INC. and ALLIED AIR FREIGHT INTERNATIONAL CORP.,

*Petitioners,*

*against*

HONORABLE EDMUND L. PALMIERI, Judge of the United States District Court for the Southern District of New York,

*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS IN OPPOSITION

### Opinions Below

None of the three opinions of the District Court is as yet reported, but copies of all those opinions are annexed as part of the Appendix to the Petition (Appendix A, pp. 7a-22a). The *per curiam* opinion of the Court of Appeals is reported at 340 F.2d 160, and is also annexed as part of the Appendix to the Petition (Appendix A, pp. 1a-4a).

## Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

## Questions Presented

Respondents cannot agree with the "Questions Presented" as stated by petitioners in their Brief (pp. 3-4). In particular, respondents do not agree that petitioners' question (2a) is presented at this stage of this litigation. Respondents' formulation of the questions presented to this Court by the Petition is as follows:

1. As to the dismissal of the appeal to the Court of Appeals (first case):

Whether an interlocutory order of the District Court which stays a civil anti-trust case involving two regulated air carriers until the plaintiff has exhausted its available remedies before the Civil Aeronautics Board is appealable under 28 U. S. C. Section 1292(a)(1), which makes appealable interlocutory orders granting, continuing, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

2. As to the denial by the Court of Appeals of a writ in the nature of mandamus (second case):

Whether in granting the stay order the District Court judge committed clear abuse of discretion or usurpation of judicial power, and whether the statutory restriction placed upon appealability of interlocutory orders may be circumvented by petitions for writs of mandamus.

## Statutes Involved

The only statute pertinent to the question of appealability raised in the first case is 72 Stat. 1770, 28 U. S. C.

§1292(a)(1), set out in Appendix B to the Petition (p. 1b). The only pertinent statute with respect to the question of the denial of a writ of mandamus involved in the second case is the All Writs Act, 62 Stat. 944, as amended by 63 Stat. 102, 28 U. S. C. §1651, also set forth in Appendix B to the Petition (p. 6b).

## Statement

In the complaint, filed on January 8, 1964 in the United States District Court for the Southern District of New York (R B, 1)*, the plaintiffs, Allied Air Freight, Inc. and Allied Air Freight International Corp. (hereinafter collectively called Allied), set forth two causes of action against the defendant, Pan American World Airways, Inc. (hereinafter called Pan American), viz., (a) a Clayton Act claim for treble damages for Pan American's alleged violations of §§1 and 2 of the Sherman Act in agreement, combination and conspiracy with one Add Airfreight Corp., an air freight forwarder in direct competition with Allied, and (b) a federal tort claim for single damages based on Pan American's alleged unilateral violation of §404 of the Federal Aviation Act of 1958 (49 U. S. C. §1374) in discriminating, as an air carrier engaged in the actual operation of cargo carrying aircraft, against its would-be customer, Allied.

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* References are to pages of the records herein. In the first case, the appeal to the Court of Appeals, the record consists of two parts, separately certified and paginated, viz., the papers brought up from the District Court, and the record of proceedings in the Court of Appeals in that appeal. Since the latter consists only of the notices of motion in the appeal, the opinion of the Court of Appeals and its formal order, that portion of the record is designated herein as "RA", while the District Court record is designated as "R".

The record in the second case, an application for mandamus originating in the Court of Appeals, is designated as "RM".

By notice of motion dated March 10, 1964 (R 17; RM 23), Pan American moved in the District Court to stay the action until such time as the Civil Aeronautics Board (hereinafter called C.A.B.) has had an opportunity to exercise its primary jurisdiction by making findings relative to the allegations of the complaint. In the belief that the nature of plaintiffs' allegations are such that the C.A.B. should have an opportunity to decide whether it may wish to consider them, Honorable Edmund L. Palmieri, Judge of the United States District Court for the Southern District of New York, decided on May 22, 1964 in a written opinion discussing the authorities in the primary jurisdiction area (Appendix A, pp. 7a-15a) that the "action should be stayed until the plaintiff [Allied] exhausts its available remedies before the CAB." (Appendix A, p. 15a). In the settlement of the Court's order of June 1, 1964 to that effect (R 125, 126; RM 57, 58), Judge Palmieri denied Allied's application for a discretionary appeal certificate, finding that the criteria for certification under 28 U. S. C. §1292(b) had not been met (R 178-181; RM 56, Exhibit E, pp. 1-4) and endorsed on the order a memorandum opinion dated June 2, 1964 (Appendix A, p. 18a).

On June 19, 1964, Allied moved for reargument, praying vacatur of the stay or, in the alternative, for the grant of a discretionary appeal certificate pursuant to 28 U. S. C. §1292(b) (R 132-133; RM 60-61). Judge Palmieri granted the petition for reargument but denied the motion to vacate the June 1, 1964 order and again denied the application for a certificate (Appendix A, pp. 19a-22a).

On June 3, 1964, Allied filed a Notice of Appeal to the Court of Appeals for the Second Circuit from the order of June 1, 1964 (R 128, 129). Pan American moved to dismiss the appeal on the ground that the order was non

appealable (RA 1, 2). Allied then filed an original application for writ of mandamus, conditioned on the dismissal of the appeal, directing Judge Palmieri to vacate the stay order from which its appeal was taken (RM 1-13).

Both the motion to dismiss the appeal and the mandamus application came on to be heard before Judges Waterman, Moore and Kaufman on December 7, 1964, and the Court below, on January 13, 1965, issued a *per curiam* opinion (Appendix A, pp. 1a-4a; 340 F.2d 160) dismissing the appeal for lack of appellate jurisdiction and denying the application for mandamus. Allied has now filed a petition for a writ of certiorari to review the judgment of that Court of January 13, 1965 (Appendix A, pp. 5a, 6a).

## ARGUMENT

### I

### The Court of Appeals correctly decided that the stay order of the District Court was not an appealable interlocutory order under §1292(a)(1) of the Judicial Code.

The single question before the Court of Appeals for the Second Circuit concerning Pan American's motion to dismiss Allied's appeal from the District Court stay order was whether that order, concededly interlocutory, was nevertheless appealable as an injunction within the purview of §1292(a)(1) of the Judicial Code (28 U. S. C. §1292(a)(1)). Section 1292(a)(1) gives the Courts of Appeals appellate jurisdiction of

> "Interlocutory orders of the district courts of the United States * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving

> injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court. * * *"

The question of appealability was, of course, argued and determined without reference to the substantive merits of the determination appealed from.

In deciding that the interlocutory stay of the pending civil action was not the equivalent of an interlocutory injunction for 28 U. S. C. §1292(a)(1) appeal purposes, the Court of Appeals merely followed this Court's well-established precedents. This Court has at all times narrowly construed this statutory exception to the general rule denying appellate jurisdiction prior to final judgment, stating that "* * * piecemeal appeals have never been encouraged," *City of Morgantown* v. *Royal Ins. Co.*, 337 U. S. 254, 258 (1949), and that "* * * Congress has long expressed a policy against piecemeal appeals." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176, 178 (1955).

The leading case on the appealability of stay orders under §1292(a)(1) is *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379 (1935). There, the defendant moved to stay plaintiff's action to recover the proceeds of a life insurance policy pending the prior trial of a counterclaim for cancellation of the policy for fraud. The defendant's motion was granted, and plaintiff sought an appeal. This Court held that, on the facts stated in that case, the Court of Appeals had jurisdiction over the appeal because the stay was the granting of an injunction within the meaning of §1292(a)(1).

Although there had been partial merger of law and equity in the federal courts at the time, this Court viewed the stay as having been issued by a court of equity to enjoin a court of law since the action being stayed was

historically legal and the defense being asserted was historically equitable. Thus, this Court drew the line between appealable and nonappealable stays on the basis of the historical nature of the actions involved. Stay orders that would have been equity injunctions staying actions at law were appealable; all other stays were not. In addition, mere stays of proceedings, based on the inherent power of any court to control the progress of the case before it, were not appealable regardless of the nature of the underlying actions or proceedings. This Court said in *Enelow*:

> "[Section 1292(a)(1)] contemplates interlocutory orders or decrees which constitute an exercise of equitable jurisdiction in granting or refusing an injunction, as distinguished from a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the cause so as to maintain the orderly processes of justice. The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of [§1292(a)(1)]." (293 U. S. at 381, 382).

The *Enelow* decision was subsequently reaffirmed in *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U. S. 188 (1942), after the complete merger of law and equity in the federal courts. In *City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U. S. 254 (1949), the *Enelow* doctrine was reaffirmed and this Court made it clear that only stays which conformed to the rule of *Enelow* are appealable. It held that a refusal to stay an action for reforma-

tion of an insurance policy (an historically equitable proceeding) so that a counterclaim for recovery on the policy might be tried was nonappealable under §1292(a)(1) because the case did not involve the stay of a legal action in order to allow a proceeding in equity to go forward.

*Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176 (1955), is the most recent pronouncement of policy by this Court on the subject of the appealability of stay orders. There a District Court had refused to stay an equitable action for an accounting in order to allow an arbitration to go forward. This Court held that the denial of such a stay was not appealable, and reaffirmed the two basic criteria laid down in *Enelow* for determining the appealability or non-appealability of stays.

It stated:

> "[The order of the District Court] was a mere order and not an injunction as that word is understood through the *Enelow* and the *Ettelson* cases as a stay through equitable principles of a common-law action. * * *" (p. 184)

It stated further:

> "The point was made in the *Enelow* case that power to stay mere steps within the framework of the litigation before a court differs as to appealability from an injunction prohibiting proceedings in another court. * * *" (p. 183)

The decisions of the Courts of Appeals are wholly in accord with this formulation, i.e., an interlocutory order is only appealable under §1292(a)(1) if it stays (or refuses to stay) a legal action to allow trial of an equitable defense or counterclaim. See, *e.g.*, *Jackson Brewing*

*Co.* v. *Clarke*, 303 F.2d 844 (5th Cir. 1962); *Korody Marine Corp.* v. *Minerals & Chemicals Phillipp Corp.*, 300 F.2d 124 (2d Cir. 1962); *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961), *cert. denied* 368 U. S. 986; *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F.2d 744, 746 (9th Cir. 1961); and *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485, 487 (3d Cir. 1957).

Applying the *Enelow* rule to the instant case, the Court below correctly dismissed Allied's appeal. Although Judge Palmieri's order stayed a legal action, clearly it did not do so to allow the prior trial of an equitable defense or counterclaim or, indeed, for any reason involving the court's equity power. On the contrary, that order merely postponed trial of the suit until after action by the C.A.B.

Respondents have found no case, and petitioners cite none in their brief, which, since the rule of *Enelow* was formulated by this Court, has held appealable an order granting or refusing a stay of an action in order to allow a federal administrative agency to exercise its primary jurisdiction. In fact the courts have unanimously held that such orders are not appealable, refusing to equate an administrative proceeding with what was historically an equity proceeding. See *Chronicle Publishing Co.* v. *National Broadcasting Co., Inc.*, 294 F.2d 744 (9th Cir. 1961); *New York, N.H. & H. R.R. Co.* v. *Lehigh & New England Ry. Co.*, 287 F.2d 678 (2d Cir. 1961); *United Gas Pipe Line* v. *Tyler Gas Serv. Co.*, 247 F.2d 681 (5th Cir. 1957); *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957); *American Airlines, Inc.* v. *Forman*, 204 F.2d 230 (3d Cir. 1953), *cert. denied* 346 U. S. 806; and *Beckhardt* v. *National Power & Light Co.*, 164 F.2d 199 (2d Cir. 1947).

Petitioners seek to avoid the applicability of the rule of *Enelow* by equating administrative proceedings with

arbitration proceedings. This attempted analogy is not apt and was specifically rejected by the Court of Appeals for the Third Circuit in *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957), distinguishing *Shanferoke Coal & Supply Corp.* v. *Westchester Serv. Corp.*, 293 U. S. 449 (1935).

Petitioners further attempt to avoid the unbroken line of cases holding that orders granting stays pending administrative decisions are nonappealable by arguing that in the previously decided cases another related proceeding was already pending while in the present case no such proceeding has yet been commenced. In *Day* v. *Pennsylvania R.R. Co.*, 243 F.2d 485 (3d Cir. 1957), however, no proceedings before the National Railroad Adjustment Board were pending *between the parties*. Rather the action between the parties was stayed pending the determination by the Board of cases between *other* claimants and the defendant involving like issues. Also, in *American Airlines, Inc.* v. *Forman*, 204 F.2d 230 (3d Cir. 1953), *cert. denied* 346 U. S. 806, a case which, like the case at bar, involved assertion of the primary jurisdiction of the C.A.B. in an action among regulated air carriers, the District Court's refusal of a stay was held not to be appealable, although no action was then pending between the parties before the C.A.B.

Thus, the actual pendency of another proceeding between the parties is irrelevant in determining whether the stay by a District Court of the proceedings before it constitutes the granting of an injunction, and rightly so. Clearly an order granting a stay pending administrative action is as much the exercise of control over the progress of the litigation where administrative proceedings have not yet been commenced, as where they are already pend-

ing. In both instances the court is exercising its control to give the administrative agency an opportunity to exercise its primary jurisdiction.

The dismissal by the Court below of petitioners' attempted appeal from the District Court's order was correct for a second reason. The order of the District Court was solely an exercise of the Court's inherent power to manage the course of the litigation before it. Under the *Enelow* rule such administrative "docket" orders have never been held to be appealable. See, *e.g.*, *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U. S. 176, 183 (1955). Accordingly, the Court below followed the precedents of this Court in declaring:

> "This type of docket order in a case which defers action for the time being is not an injunction order contained within an interlocutory order at law such as to permit an appeal from the granting or the denial of an injunction pursuant to 28 U. S. C. §1292(a)(1). See 6 Moore, Federal Procedure §54.07 at p. 48. Such an order is only a step in the action." (Appendix A, p. 3a; 340 F.2d at 161)

## II

**The Court of Appeals properly denied Allied's petition for mandamus as an unfounded and unwarranted attempt to circumvent the statutory restrictions placed upon appealability of interlocutory orders.**

Conditioned upon the Court of Appeals granting Pan American's motion to dismiss Allied's appeal, Allied petitioned that Court to issue an order in the nature of a writ of mandamus directing Judge Palmieri to vacate the stay order from which Allied's appeal was taken.

While Courts of Appeals under §1651(a) of the Judicial Code (28 U. S. C. §1651(a)) may issue writs of mandamus in appropriate cases, this Court has consistently held that mandamus is an extraordinary remedy to be used reluctantly and only in cases where it is beyond dispute that the trial court has arbitrarily failed to exercise its functions or has sought to exercise jurisdiction which it does not possess. In the leading case this Court stated that mandamus "is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'. * * *" *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953). Accord: *Republic of Iraq* v. *First Nat. City Bank*, 313 F.2d 194 (2d Cir. 1963); *Ward Baking Co.* v. *Holtzoff*, 164 F.2d 34 (2d Cir. 1947). None of the cases cited by petitioners dispute the applicability of this standard.

As the Court below necessarily found in applying the standard of *Bankers Life* herein, there was neither abuse of discretion nor usurpation of power by Judge Palmieri. Indeed, petitioners have nowhere claimed that Judge Palmieri has been guilty of usurpation of power, arbitrary action or obvious disregard of the law. The gravamen of their complaint against him is that they think he was wrong in his decision on defendant's motion. By their "matched appeal and conditional application for mandamus" (Pet. Brief p. 32)—in a situation where their repeated attempt to resort to §1292(b) before the District Court gave evidence of their own belief that the order was not appealable—petitioners seek merely to circumvent the statutory restrictions upon appellate review of interlocutory orders. Such attempted use of petitions for mandamus have become all too commonplace. The Court of Appeals for the Second Circuit has consistently, and cor-

rectly, refused to countenance this attempted undermining of the "final judgment" rule by giving short shift to frivolous mandamus petitions such as that herein. In doing so it has followed this Court's mandate in *Bankers Life*, where it was stated:

> "* * * it is established that the extraordinary writs cannot be used as substitutes for appeals, * * * even though hardship may result from delay and unnecessary trial * * *" *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 383 (1953).

Nor should a Court of Appeals issue a writ of mandamus merely to avoid inconvenience or delay which might be caused a plaintiff by refusing to allow an appeal from an interlocutory order where certification by the District Judge has been denied under §1292(b). In *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21 (1943), a Court of Appeals had issued a writ of mandamus directing the District Court to reinstate the defendants' plea in abatement to an indictment for violation of the Sherman Act and to try the issues of fact thus raised. The Supreme Court reversed, holding that the Court of Appeals had erred in directing that mandamus issue. Responding to defendants' contention—that the inconvenience of requiring them to undergo trial in advance of an appellate determination of their challenge to the validity of the indictment made mandamus appropriate—the Court said:

> "* * * We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. *Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its*

> *discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases.*" 319 U. S. at 30. (Emphasis added.)

Accord: *Ex Parte Fahey*, 332 U. S. 258 (1947); *Norte & Co.* v. *Defiance Industries, Inc.*, 319 F.2d 336 (2d Cir. 1963); *Abrams* v. *McGohey*, 260 F.2d 892 (2d Cir. 1958); *Alcoa S.S.* v. *Ryan*, 211 F.2d 576 (2d Cir. 1954).

Following the aforesaid precedents established by this Court and elaborating upon the criteria of "abuse of discretion or usurpation of judicial power", the Court of Appeals for the Third Circuit, per Judge Hastie, has stated the test for determining the availability of mandamus to review a jurisdictional ruling of a District Judge as follows:

> "The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error. * * *" *American Airlines, Inc.* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953), *cert. denied* 346 U. S. 806.

This test has also been adopted by the Courts of Appeals for the Fourth and Seventh Circuits. *Holub Industries, Inc.* v. *Wyche*, 290 F.2d 852 (4th Cir. 1961); *General Tire & Rubber Co.* v. *Watkins*, 326 F.2d 926 (4th Cir. 1964); *Comfort Equipment Co.* v. *Steckler*, 212 F.2d 371 (7th Cir. 1954).

In *American Airlines* defendants had petitioned for a writ of mandamus to restrain the District Court from going forward with the trial of an antitrust action on the ground that the court could not adjudicate the controversy without unlawfully encroaching upon the primary jurisdiction of the regulatory agency.

Applying its test to the facts, the Court of Appeals for the Third Circuit found that:

> "Thus tested, the present case is obviously inappropriate for a peremptory writ. The court has neither ignored nor refused to follow any clear dictate of the law. The case is one of an increasing number where a rather involved problem of possible conflict of jurisdiction between a court and an administrative agency must be solved. If the circumstances were plainly comprehended by a statutory directive that resort be first to the administrative agency, the assumption of jurisdiction by a court would be a usurpation of power properly checked by an extraordinary writ. But such clear cases aside, there often is need as here for judicial appraisal of the less than apparent interrelation of legislation under which it is argued that primary resort should be to an administrative tribunal and other provisions of law which standing alone would empower a court to proceed forthwith. The language, structure and legislative history of statutes must be examined. Relevant judge made doctrine must be considered. The interplay of these factors must be rationalized. The facts before the court must be analyzed in relation to the legal rationalization. If, after exercising professional skill and judgment in working through a process of this sort a court decides, rightly or wrongly, that it has jurisdiction, it is most unlikely that the judge will have merited that peremptory admonition which is reserved principally for cases of abuse or gross misuse of power." (204 F.2d at 232)

The instant case was similarly inappropriate for the issuance of a writ of mandamus. Judge Palmieri's opinions herein clearly indicate that he considered with great care in the light of the statutes and the precedents (with the benefit of extensive briefing and oral argument by both sides) whether primary recourse to the C.A.B. should be prerequisite to the establishment of petitioners' claim (Appendix A, pp. 7a-15a, 19a-22a). His ruling that the action below should be stayed until the petitioners exhaust their available remedies before the C.A.B. is supported by "rational and substantial legal argument": it was reached through the exercise of "professional skill and judgment." It cannot be said that there was such clear "abuse or gross misuse of power" by Judge Palmieri as would render the case appropriate for mandamus.

Petitioners contend, however, that a stay granted by a District Court to permit the exercise of primary jurisdiction by an administrative agency stands in a special light because unless mandamus issues to review such a stay the Court's determination will never be reviewable. On this basis they suggest that the standard for determining the availability of mandamus to review a jurisdictional ruling must be different where a District Court grants such a stay from where it refuses to grant a stay. Such a contention, particularly as applied to this case, is absurd. As the Court below stated:

> "Obviously, the stay order, as well as not adjudicating upon plaintiffs' claims, does not finally dispose of the district court suit or necessarily preclude a sometime trial in that forum of plaintiffs' claims. The order below only provides that the case is not to be brought forward on the docket until the Board is given an opportunity to consider what, if any, attention it may accord the litigation, and has ex-

hausted that opportunity." (Appendix A, p. 3a; 340 F.2d at 161.)

Therefore, the stay order in no way defeats the appellate jurisdiction of the Court of Appeals, and sooner or later the case can come up through normal appeal channels at which time the correctness of Judge Palmieri's order will be appropriate for review by the Court of Appeals.

Petitioners devote a major portion of the section of their Brief dealing with mandamus (pp. 19-29) to a reargument, on the merits, of the substantive questions which were before Judge Palmieri on defendant's motion for a stay. Respondents contend, of course, that Judge Palmieri was completely justified, on the law and on the facts, in staying the instant action until plaintiffs had exhausted their administrative remedies before the C.A.B. for all the reasons set forth in his several opinions (Appendix A, pp. 7a-15a; 18a-22a). However, respondents believe that reargument of the substantive questions determined by Judge Palmieri is not appropriate at this stage of the case because the standard for determining the availability of mandamus is whether the District Judge has committed gross abuse of discretion or usurpation of judicial power. "If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus or prohibition even though on normal appeal a reviewing court might find reversible error. . . ." *American Airlines, Inc.* v. *Forman*, 204 F.2d 230, 232 (3d Cir. 1953), *cert. denied*, 346 U. S. 806. Accordingly, in order not to burden this Court unnecessarily with arguments on questions not presented to it at this time, respondents make no answer herein to the arguments contained in the aforementioned pages of petitioners' Brief under the heading "Primary Jurisdiction".

## III

**There are no serious questions raised by the decision of the Court below which warrant review by this Court.**

The decision of the Court below, both in dismissing the appeal and in denying mandamus, followed clearly established precedents of this Court and raised no important questions of federal law which have not been, or should be, settled by this Court. The decision is not in conflict with any decision of any other Court of Appeals. Moreover, the Court below has not in any way departed, or allowed the District Court to depart, from usual and accepted judicial proceedings. Thus, no exercise of this Court's power of supervision is called for.

With respect to the dismissal of the appeal, petitioners advance two grounds upon which they would have this Court review the decision below. First, they state that this Court should now decide whether an administrative proceeding can be equated with an equitable defense or counterclaim in applying the *Enelow* rule. No court has ever before intimated that such an equation can be made. Indeed, as pointed out at page 9, *supra*, the six Court of Appeals cases that have considered this question (in four different Circuits) have unanimously held that administrative proceedings should not be deemed equitable defenses or counterclaims for this purpose.

Secondly, petitioners argue that this Court should grant review because Judge Palmieri's order "differs from a conventional injunction only in that compliance is motivated by the desire of the suitors to save their suit rather than an unnecessary contempt sanction" (Pet. Brief, p.

18). But compliance with any Court's order staying proceedings pending before it is so motivated, and this Court has already set forth in *Enelow*, *Ettelson*, *City of Morgantown*, *Baltimore Contractors*, and other cases the rules which are to be followed in determining whether such stay orders are appealable injunctions under Section 1292(a)(1). No further clarification is required.

On the question of the availability of mandamus, petitioners state two reasons why this Court should review the decision of the Court below. First, they state that "an important question of federal law exists with respect to" the alleged refusal by the Court below to review the merits of the decision by Judge Palmieri (Pet. Brief, pp. 32-33). Leaving aside the question of whether it may fairly be assumed from the decision of the Court below that it did not review the merits, respondents contend that the substantive questions of law determined by Judge Palmieri in issuing his order were not appropriately before the Court below on any issue.

The second question submitted by the petitioners for review by this Court with respect to the denial of mandamus is "whether the Court of Appeals was bound by the applicable decisions of this Court to issue mandamus" (Pet. Brief, p. 33). Respondents believe, however, that they have demonstrated in Part II, *supra*, that the denial of mandamus by the Court below was in complete conformity with, and in fact dictated by, the applicable decisions of this Court.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.**

Dated: May 5, 1965

Respectfully submitted,

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